

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VALLEY FORGE INSURANCE
COMPANY, et al.,

Plaintiffs,

v.

WASHINGTON SQUARE HOTEL
HOLDINGS LLC, et al.,

Defendants.

CASE NO. C21-0847JLR

ORDER

I. INTRODUCTION

Before the court is Plaintiffs Valley Forge Insurance Company and Continental Casualty Company's (collectively, "Plaintiffs") motion to compel discovery from Defendant Washington Square Hotel Holdings, LLC ("WSHH"). (Mot. (Dkt. # 53); Reply (Dkt. # 59).) WSHH opposes the motion. (*See* Resp. (Dkt. # 58-1).¹) The court

¹ WSHH initially filed a response on November 14, 2022. (*See* 1st Resp. (Dkt. # 55).) On November 15, 2022, WSHH filed a praecipe asking the court to replace its November 14,

1 has considered the parties' submissions, the balance of the record, and the applicable law.
 2 Being fully advised,² the court DENIES in part Plaintiffs' motion and ORDERS WSHH
 3 to provide unredacted copies of the documents identified below to the court for its *in*
 4 *camera* review no later than December 8, 2022.

5 II. BACKGROUND

6 This declaratory judgment action arises out of the construction of a Hilton Garden
 7 Inn hotel in Bellevue, Washington that began in 2015 (the "Project"). (*See* Compl. (Dkt.
 8 # 2) ¶¶ 4.2-4.4; Answer (Dkt. # 10) ¶¶ 4.2-4.4.) WSHH, the owner of the Project, seeks
 9 to recover losses allegedly caused by its former general contractor, Vandervert
 10 Construction, Inc. ("Vandervert"), under insurance policies Plaintiffs issued to
 11 Vandervert. (*See* Compl. ¶¶ 4.2-4.4, 6.3-6.5; Answer ¶¶ 4.2-4.4.) In relevant part³,
 12 WSHH asserts that Plaintiffs breached their obligation to pay Vandervert's pre-tender
 13 defense costs, and that this alleged breach, "standing alone, supports WSHH's
 14 [counterclaims]." (*See* 2nd MSJ Resp. (Dkt. # 41) at 2-3, 12-14.) Plaintiffs, who
 15 describe the allegedly unpaid defense costs as Plaintiffs' "sole basis of harm," asked

16 _____
 17 2022 filing with a copy containing non-substantive corrections. (*See* Praecipe (Dkt. # 58); Ex. 1
 18 (Dkt. # 58-1) (containing WSHH's corrected response).) The court cites to WSHH's corrected
 response attached to the praecipe.

19 ² Neither party has requested oral argument (*see* Mot. at 1; Resp. at 1), and the court
 concludes that oral argument is not necessary to dispose of the motion, *see* Local Rules W.D.
 Wash. LCR 7(b)(4).

20 ³ The court detailed the procedural background of this case in its July 7, 2022 order
 21 regarding Plaintiffs' second motion for summary judgment on WSHH's counterclaims. (*See*
 22 7/7/22 Order (Dkt. # 46) (denying Plaintiffs' motion without prejudice so the parties can conduct
 discovery).) The court need not repeat this history here and instead discusses only the procedural
 background relevant to the instant motion.

1 WSHH to produce documents that would substantiate the alleged injury. (*See* Mot. at 2.)
2 WSHH produced a number of emails between counsel for WSHH and counsel for
3 Vandervert’s receiver, Rick Wetmore, between July 25, 2022 and September 16, 2022, or
4 the period when Plaintiffs were allegedly in breach of their obligations to WSHH. (*See*
5 Mot. at 2.) WSHH redacted some sections of these emails, asserting they contain
6 attorney work product. (*See* Supp. Rainwater Decl. (Dkt. # 60) ¶ 2, Ex. 11 (“Privilege
7 Log”) at 4-6.)

8 Plaintiffs now ask the court to compel WSHH to produce these emails without
9 redaction. (*See generally* Mot.) In the alternative, Plaintiffs seek *in camera* review of the
10 emails. (*Id.* at 13.) WSHH opposes the motion, contending that the redacted portions of
11 these emails are subject to the attorney work product protection. (*See* Resp. at 3).
12 However, WSHH states that it would consent to *in camera* review of the emails. (*See id.*)

13 III. ANALYSIS

14 The court first reviews the legal standard for obtaining discovery of allegedly
15 privileged documents before turning to Plaintiffs’ motion.

16 A. Legal Standard

17 “Parties may obtain discovery regarding any nonprivileged matter that is relevant
18 to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P.
19 26(b)(1). Under Federal Rule of Civil Procedure 37, “a party seeking discovery may
20 move for an order compelling an answer, designation, production, or inspection.” Fed. R.
21 Civ. P. 37(a)(3)(B). The “work-product doctrine ‘protects from discovery documents and
22 tangible things prepared by a party or his representative in anticipation of litigation.’”

U.S. v. Richey, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989)). The work product doctrine, however, “is intended only to guard against the divulging of [an] attorney’s strategies and legal impressions,” and therefore “does not protect facts . . . contained within the work product.” *Cal. Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 644 (E.D. Cal. 2014) (internal quotation marks omitted) (quoting *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003)). A party may not use the work product doctrine “both as a sword and a shield. . . . Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)); *see also Volcan Group, Inc. v. T-Mobile USA, Inc.*, No. C10-0710RSM, 2011 WL 6141000, at *3 (W.D. Wash. Dec. 9, 2011) (holding litigant waived work product doctrine protection by using the protected material “both as a sword and a shield”). A party seeking to discover documents that are protected by the work product doctrine must demonstrate a “substantial need” to obtain them or inability to obtain the equivalent without undue hardship. *Admiral Ins. Co. v. U.S. Dist. Ct. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989) (citing *Upjohn v. United States*, 449 U.S. 383, 401 (1981)); *see also* Fed. R. Civ. P. 26(b)(3).

B. Plaintiffs’ Motion to Compel

Plaintiffs argue that they are entitled to the unredacted emails between Mr. Wetmore and counsel for WSHH because the redacted sections are “purely factual”

1 discovery regarding WSHH's alleged defense costs and are therefore not protected by the
2 work product doctrine. (*See Mot.* at 10-11.) In the alternative, Plaintiffs argue that even
3 if the redacted sections contain work product, WSHH has waived the protection by using
4 the correspondence to confirm the defense costs without producing the same
5 correspondence. (*See id.* at 11-13.)

6 WSHH responds that the redacted portions of the emails consist of
7 communications from counsel for WSHH to Mr. Wetmore and asserts that these
8 messages are protected by the work product doctrine. (*See Resp.* at 9-10.) WSHH also
9 argues that Plaintiffs do not have a substantial need for the emails because the redacted
10 text is not necessary to establish Plaintiffs' liability for the defense costs WSHH
11 allegedly incurred. (*See id.* at 12.) WSHH argues further that Plaintiffs can access the
12 information contained therein through the invoices already produced or by deposing Mr.
13 Wetmore. (*See id.* at 12-13.⁴)

14 To begin, the court notes that the parties dispute the number of emails at issue.
15 (*Compare Reply* at 5 (contending that "there are at least nine emails at issue"), *with Resp.*
16 *at 10* (asserting that Plaintiffs' motion refers to three emails).) The court concludes that
17 counsel for WSHH and Mr. Wetmore had nine email exchanges during the relevant
18 period, identified by the following Bates numbers: WSHH194969-71;
19 WSHH194972-75; WSHH194979-81; WSHH194982-83; WSH194984-90;

21 ⁴ WSHH also uses much of its brief to argue the merits of its counterclaims. (*See Resp.*
22 *at 4-10.*) These arguments are not properly before the court on Plaintiffs' motion to compel
discovery, and the court need not address them here.

1 WSHH194997-5001; WSHH195002-09; WSHH195011-18; and WSHH195019-47. (*See*
2 Privilege Log at 4-6.)

3 The court concludes that *in camera* review of these emails is necessary to
4 determine whether the redacted portions of the emails are protected by the work product
5 doctrine. *See, e.g., Gamble v. State Farm Mutual Auto. Ins. Co.*, No. C19-5956RJB,
6 2020 WL 4193217, at *4 (W.D. Wash. July 20, 2020) (ordering *in camera* review where
7 it was “not obvious to the [c]ourt whether” disputed materials were subject to privilege);
8 *Grayless v. Allstate Ins. Co.*, Case No. C21-5492DWC, 2021 WL 6498255, at *3 (W.D.
9 Wash. Dec. 16, 2021) (same). Following its review, the court will determine whether to
10 compel WSHH to produce the unredacted emails.

11 **C. Attorneys’ Fees**

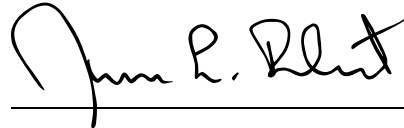
12 Each party requests attorneys’ fees incurred in bringing or defending this motion.
13 (*See* Mot. at 13; Resp. at 13.) The court declines to rule on this issue at this time; rather,
14 it will address whether fees should be awarded after it has conducted *in camera* review of
15 the emails.

16 **IV. CONCLUSION**

17 For the foregoing reasons, the court DENIES in part Plaintiffs’ motion (Dkt. # 53)
18 and ORDERS WSHH to provide unredacted copies of the following documents to the
19 court no later than December 8, 2022: WSHH194969-71; WSHH194972-75;

WSHH194979-81; WSHH194982-83; WSH194984-90; WSHH194997-5001;
WSHH195002-09; WSHH195011-18; and WSHH195019-47.

Dated this 1st day of December, 2022.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART
United States District Judge